

1836216 (Migration) [2020] AATA 2105 (5 May 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1836216

MEMBER: Rosa Gagliardi

DATE: 5 May 2020

PLACE OF DECISION: Australian Capital Territory

DECISION: The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Statement made on 05 May 2020 at 4:31am

CATCHWORDS

MIGRATION – cancellation – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – incorrect information in visa applications – two children with another partner not declared – breakdown of relationship with first partner and claim of family violence – children with second partner granted visas, sponsored by applicant, and application for partner visa – credibility – applicant's migration history – passport and visa fraud – citizenship and residence rights of second partner and children – family unit and best interests of children – children's mental health – first partner impeding access to Australian citizen children – Family Court proceedings – decision under review set aside

LEGISLATION

Migration Act 1958 (Cth), ss 101, 107, 109, 359A

Migration Regulations 1994 (Cth), r 2.41

CASE

MIAC v Khadgi (2010) 190 FCR 248

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 801 (Spouse) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant breached s.101 of the Act which requires an applicant to fill in or complete his or her application form in such a way that: (a) all questions on it are answered; and (b) no incorrect answers are given or provided. The delegate found that there were grounds to cancel the visa in light of the applicant's circumstances.
3. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
4. The applicant appeared before the Tribunal on three occasions to give evidence and present arguments. The Tribunal also received oral evidence from several witnesses.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
8. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
9. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

10. Background

11. The visa holder is a national of [Country 1] but was born in [Country 2] and also lived in [Country 3].
12. The visa holder lodged an application for a Prospective Marriage (subclass 300) visa with Australian citizen, [Ms A]. In the course of the application the visa holder declared that his relationship with [Ms A] commenced [in] February 2010.
13. The visa holder's and [Ms A]'s first child was born on [Date 1] ([Child 1]).

14. The visa holder was then granted a Prospective Marriage (subclass 300) visa on 14 May 2013. He arrived in Australia as a holder of that visa [in] July 2013. Subsequently, the visa holder applied for his Combined Partner (subclass 820/801) visa, with [Ms A] listed as the sponsor. He was then granted a Temporary Partner (subclass 820) visa on 16 July 2014.
15. The second child of the visa holder and his sponsor, [Ms A], was born on [Date 2] ([Child 2]).
16. On 21 October 2014, the Department received information that the visa holder's relationship with [Ms A] had broken down. On 1 December 2014 the Department was advised that the visa holder and [Ms A] had reconciled their relationship. On 27 April 2015 the Department was again advised that the relationship had broken down on 14 March 2015.
17. On 11 May 2015 the Department requested evidence to assess whether the visa holder met the criteria for the second stage Permanent Partner (subclass 801) visa. The visa holder argued that while his relationship with [Ms A] had broken down, he met the exceptions for the grant of the visa even though he did not have a sponsor. He provided evidence of his children's birth certificates and provided statements regarding custody arrangements and financial obligations for his children with [Ms A].
18. The visa holder's Partner (subclass 801) visa was granted on 16 June 2015 as per subclause 801.221(6).
19. On 20 June 2017, [Ms B] lodged a Prospective Marriage (subclass 300) visa application online. The sponsor for [Ms B] was the visa holder. In his application the visa holder declared that he had separated from [Ms A] [in] March 2015.
20. Within [Ms B]'s application for a Prospective marriage (subclass 300) visa, she advised that she had two children with the visa holder:
 - [Child 3] (DOB: [Date 3])
 - [Child 4] (DOB: [Date 4]).
21. Birth certificates for both children were provided, naming the visa holder as their father. The Tribunal understands that the Prospective Marriage (subclass 300) visa on the basis of the applicant's intention to marry [Ms B] is still under consideration by the Department.
22. At the time of lodging his Prospective Marriage (subclass 300) visa on 20 March 2012, the visa holder omitted to declare he had a child with [Ms B] born in [Year 3].
23. The visa holder, on lodging Child visas (subclass 101) visas for [Child 3] and [Child 4] to live with him in Australia in October 2015, wrote to the Department to advise that he had neglected to mention these two children conceived with [Ms B] in his previous applications and was sorry for having done so. The children were subsequently granted Child visas by the Department on 12 April 2017 in the awareness that the visa holder had provided an incorrect answer in his subclass 300 visa and his subclass 801 visa when he again neglected to mention his children [Child 3] and [Child 4] who were living overseas with [Ms B] in [Country 3].
24. The Tribunal's investigations of how the visa holder's children conceived with [Ms B] came to be granted visas to Australia on 12 April 2017, reveal that the Department had considered cancelling the visa holder's subclass 801 visa on the basis that the visa holder had fallen foul of section 101 of the Act which requires a non-citizen to fill in or complete his or her

application form in such a way that: (a) all questions on it are answered; and (b) no incorrect answers are given or provided but decided not to.

25. While the Department had concerns that it appeared that the visa holder had provided incorrect answers in his applications and had withheld from the Department that he initially had one child, and then another, with [Ms B] and that there was a possibility that the visa holder had not been in a mutually exclusive spousal relationship with [Ms A], it was decided that the visa holder's subclass 801 visa should not be cancelled due to "*insufficient information to cancel*" and no further action was taken by the Department. [Ms B]'s children were thus enabled to be granted Child visas (subclass 101) despite the Department being aware that the visa holder had engaged dishonestly with the Department prior to the visa holder's subclass 801 visa being finally cancelled by the Department on 5 December 2018.
26. It was after the children had settled in Australia that the visa holder decided to sponsor the children's mother, [Ms B] in 2017.
27. The visa holder claims that [Ms A], his initial sponsor, was aware of his first daughter, [Child 3], early in their relationship. He also claims that he disclosed his affair with [Ms B] to [Ms A] and the birth of his second child to her, however he and [Ms A] chose to maintain their relationship before the relationship deteriorated.
28. Both in response to notification of possible cancellation by the Department and at review, the visa holder has argued that his relationship with [Ms A] became abusive and she forbade him from mentioning his children with [Ms B] when he lodged the Prospective marriage (subclass 300 visa) and the Combined Partner(subclass 820/801) visa applications.

29. *The hearings*

30. The Tribunal put to the visa holder both at hearing and via a section 359A letter, adverse information about his migration history and allegations levelled at his motivation for having entered into a relationship with [Ms A], being that it was for the sole purpose of gaining a migration outcome. Some of the allegations and other information is protected by Certificates, but the Tribunal considered that given the information went very much to the heart of the visa holder's credibility, the Tribunal decided to divulge the gist of this information to him.
31. From the outset the visa holder argued that he was a citizen of [Country 1] and that he no longer had a meaningful right to enter and reside in [Country 3]. He used to have a permit to be able to work there but has now been living away from [Country 3] for some time and his future there would be uncertain. At hearing the applicant argued that [Country 3] was becoming increasingly intolerant of migrants and that he could not see that he had future prospects in terms of being able to support himself and his family.
32. The Tribunal highlighted on many occasions that if it were to decide that the visa should be cancelled, the visa holder ought to make available to the Tribunal, probative evidence of the countries in which he could enter and reside. This would enable the Tribunal to assess the difficulties he and his children with [Ms B] would encounter on return to their particular country of nationality.
33. The Tribunal raised with the visa holder the serious matter of him having been denied entry into [Country 4]. It appeared that he was in possession of a [Country 2] passport when he came to Australia but used a [Country 1] passport to enter the country. His date of birth was different in each of the passports held by him. He departed for [Country 3] via [Country 4] in late 2013 but was refused entry in [Country 4] and was required to return to Australia. This

was because he was found to have had a fraudulent Schengen visa as he had attempted to enter Europe through a stolen blank visa label.

34. The Tribunal attempted at hearing to elicit information from the visa holder about the events that led him to having a fraudulent Schengen visa and the circumstances in which he was refused entry at [Country 4]. The visa holder claimed that he saw a lawyer in [Country 3] who told him he could expedite the process. The lawyer had been responsible for all his paperwork. The visa holder argued that he was blameless in the entire process as he considered that the lawyer would have had his paperwork in order.
35. The Tribunal argued that the visa holder would have been aware that something was amiss if he had a blank label in his passport. The visa holder continued to assert that he was oblivious to any fraud committed by his lawyer and that he had heard that others had had the same thing happen to them.
36. Returning to the issue of where the visa holder and his and [Ms B]’s children might ultimately end up residing if his visa were cancelled, he responded that [Ms B] was currently living in [Country 3]. She had [Country 5] nationality but had applied for [Country 3] citizenship and it was under consideration by the authorities there. [Ms B] herself confirmed this was the case at hearing. The Tribunal contended that if [Ms B] were granted [Country 3] nationality then it might be open to her to sponsor the visa holder and their children so that they could live together as a family in [Country 3]. The visa holder has argued that life would be difficult for his children and himself in [Country 3] even if [Ms B] were able to sponsor them so that they could achieve [Country 3] nationality.
37. The Tribunal also tried to clarify with the visa holder as to why [Ms B], who he claims he was not in a relationship with at the time he sponsored his children to Australia, would have permitted her children to migrate to Australia knowing that the separation from the children could be permanent. According to the visa holder’s testimony, there was no reason at that stage to think that the visa holder would sponsor the children’s mother to Australia given he was not in a relationship with her. The visa holder asserted that he wanted their children to have a better future here as their residence in [Country 3] was uncertain and the country was undergoing a crisis. [Ms B] stated that she had been comfortable sending her children to Australia given the economic hardships faced in [Country 3] and given that she knew her children would be looked after by the visa holder in Australia.
38. The Tribunal stated that it might have concerns that the visa holder had in effect attempted to strategise to enter into a relationship with an Australian citizen ([Ms A]) with the long-term plan of bringing to Australia his genuine partner and their children, being [Ms B] and [Child 3] and [Child 4]. The visa holder denied this was the case and stated that [Ms A] had deprived him of the opportunity to list his two children with [Ms B] on his applications (being his subclass 300 and 801 applications).
39. The Tribunal expressed doubt that the visa holder would allow himself to be coerced by [Ms A] such that he would be led to again breach immigration rules to provide incorrect information in his applications. The Tribunal expressed the view that it appeared incredulous that the visa applicant, having fallen foul of immigration rules at an international level, would again knowingly contravene s.101 of the Act because he was beholden to [Ms A]. As the Tribunal highlighted, it was always open to the visa holder not to agree to [Ms A]’s terms of sponsorship, rather than deny his children’s existence. The Tribunal again reinforced the view that the visa holder was being expedient in concealing from the Australian immigration authorities his two children with [Ms B] because it would cast significant doubt over his relationship with [Ms A] and his motivations for having entered that relationship.

40. The visa holder stated that he had been the subject of family violence at the hands of [Ms A] and feared her and had gone to report the matter to the police. He stated that she had stabbed him in the hand and he feared that she would kill him. The Tribunal noted that the police report submitted simply reiterated that the visa holder had reported that he was the subject of family violence. There was no probative evidence by way of medical treatment received for his hand or that the police, in the circumstances, took out an intervention order to protect the visa holder. The visa holder stated that there was no evidence of [Ms A] trying to kill him because he did not want her to be in trouble. She was the mother of his children. This being the case, the Tribunal asked whether he was fearful at all about the safety of their two children given her volatility. The Tribunal asked whether the Child Protection Agency had been notified at all. The visa holder stated that the police had notified the agency and the visa holder told the Child Protection Agency that she was a good mother.
41. The Tribunal advised that it had difficulty accepting that the visa holder had been subject of an attempt to kill and grievous bodily harm but no action was taken against her at criminal law. The Tribunal also observed that the visa holder did not have evidence from the Child Protection authority that would demonstrate that a meaningful discussion had occurred about the safety of the children and that they were permitted to continue to live in [Ms A]’s household in which serious violence had allegedly been perpetrated.
42. The visa holder also attempted to make much of the fact that he wrote a letter on sponsoring his children with [Ms B] to disclose to the Department that he had not declared these children when he had been sponsored by [Ms A]. The Tribunal noted that his actions were not spontaneous ones motivated by a sense of remorse for what he had done. Rather, they were self-serving in that he would not be able to sponsor [Ms B]’s children to Australia under Child visas had he not declared them when sponsoring them to Australia in 2015.
43. The visa holder claimed he met [Ms B] via an online dating website in 2005 while he was living in [Country 1] and she was in [Country 3]. They met in person a few months later in [Country 2] while both on holidays. After the visa holder returned to [Country 1], [Ms B] discovered she was pregnant with their child, [Child 3]. Due to their distance apart, the visa holder insisted he was not in a relationship with [Ms B], despite her being pregnant with his child.
44. At hearing the migration agents argued that there was no positive proof that the visa holder and [Ms B] had ever lived together in a de facto relationship or that they had married and that it was speculative on the Tribunal’s part to infer that the visa holder and [Ms B] had always been in a genuine and continuing relationship to the exclusion of others. The witness and friend of the parties who was living in [Country 3], [Ms C], stated that she had observed that the visa holder and [Ms B] had never lived together.
45. The visa holder stated that [Ms A] had deprived him of seeing the two children they had in common: [Child 1] and [Child 2]. He provided evidence that he had attempted mediation but that [Ms A] was refusing to permit him see the two children they had conceived together. Asked why he had not pursued the matter in the Family Court, he stated that he could not fight two battles at once – first he would resolve his immigration status and then he would look to find a way to have access to his children.
46. The migration agents argued at hearing that the Department had made a decision not to cancel the visa holder’s visa due to a lack of evidence when it was apparent that he had provided incorrect answers in his applications. They argued that it was not evident what new evidence had emerged to warrant the cancellation more recently in 2018. The Tribunal noted that it was when the visa holder sponsored [Ms B], the mother of their two children, to Australia under a subclass 300 visa, that the Department inferred that the visa holder may

have always intended to bring [Ms B] to Australia, and that he had always been in a genuine and continuing relationship with her.

Was there non-compliance as described in the s.107 notice?

47. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled.
48. Section 107A provides that failure to comply with subsection 101(a) and/or 101(b) of the Act in connection with a previous visa application may be grounds for cancellation of the visa holder's current visa.
49. The non-compliance identified and particularised in the s.107 notice was non-compliance with section 101 as specified in the s.107 notice in the following respects:
 - It appears that the visa holder did not comply with section 101(a) of the Act in relation to his *Form 47SP – Application for migration to Australia by a Partner* lodged on 20 March 2012 because he did not provide an answer to a question which asked for information regarding existing facts about his personal relationship and family history.
 - At Part D of Form 47SP, in response to question 38 “*YOUR CHILDREN*” the visa holder did not provide a response, indicating that he did not have any children. This answer was incorrect because the applicant did not declare his child [Child 3] (DOB: [Date 3]) born to [Ms B].
 - The applicant also appears not to have complied with section 101(b) of the Act in relation to answers provided in his *Form 47SP- Application for migration to Australia by a Partner* lodged on 20 March 201 because he provided an incorrect answer:
 - At Part C of Form 47SP, in response to question 24, “Have you ever been in a same-sex or opposite-sex de facto relationship before?” the visa holder ticked the box denoting “No”. This appears to have been an incorrect answer because he did not declare he was in a relationship with [Ms B], who had previously had a child to him in [Year 3].
 - At Part N of Form 47SP, the visa holder signed a declaration in response to the statement “*I declare that the information I have supplied in this application is complete, correct and up to date in every detail*”. It appears that this declaration is incorrect as it appears that the visa holder had provided incorrect information in relation to the questions outlined above.
50. The Tribunal finds that the visa holder did not comply with s.101(a) on lodging his subclass 300 visa on 20 March 2012 when he was being sponsored by [Ms A], because he clearly had a child living overseas.
51. In terms of whether the visa holder had not complied with s.101(b), the Tribunal is equivocal – that is, whether the visa holder provided incorrect information because he did not disclose he had been in a previous relationship with [Ms B] as at March 2012. This is not a straight-forward matter as the evidence that the visa holder was in a relationship with [Ms B] 8 years ago is negligible.
52. On the one hand the visa holder has a history of engaging in fraudulent conduct and the Tribunal is not convinced that he has been a victim of a lawyer's fraud as claimed in relation to his international travel movements. The Tribunal does not have information before it, however, to conclude precisely what happened when the visa holder attempted to enter

[Country 4] on a false visa. The Tribunal does not have before it, for example, evidence that Interpol became involved or that the visa holder was charged with any offence. The Tribunal notes that the Department had the information about the visa holder's possible character issues at the time it granted the Child visas in 2015, and was in a position to cancel his subclass 801 visa then but did not do so.

53. The Tribunal also noted at hearing that the visa holder's credibility was not sound as at hearing he appeared to shift his account to suit the circumstances and was able to provide little credible corroboration of his claims of family violence, for example. It is therefore possible that the visa holder had married [Ms A] to obtain Australian permanent residency to enable [Ms B] and their two children to migrate to Australia at a later date, although the Tribunal notes that the visa holder also has two children with [Ms A]. The fact the visa holder had two children with [Ms A] over a period would also suggest that the visa holder was in a spouse-like relationship with her.
54. The Tribunal has considered the scenarios in which the visa holder might have withheld the information about his first child but is not persuaded that on the evidence before it, the visa holder was the victim of family violence which involved [Ms A] not enabling him to declare his child. On another reading, the visa holder may have been concerned about declaring the child as it could have linked him with [Ms B] when there was no relationship with her, and he was concerned about his subclass 300 visa application being impeded.
55. The Tribunal would be, in finding that the visa holder and [Ms B] were engaged in a spouse-like relationship in March 2012, relying on little evidence to reach such a conclusion, acting unreasonably, and indeed the Tribunal does not, as there is considerable doubt.
56. Having regard to the evidence before it, however, the Tribunal considers that it is more likely than not that by the time of the birth of the second child, [Child 4], in [Year 4], the visa holder and [Ms B] had formed a spouse-like relationship. The Tribunal is not minded to accept that the conception of [Child 4] was something that [Ms B] and the visa holder put down to an accident, but was more likely than not, borne out of a spouse-like relationship between [Ms B] and the visa holder; indeed they had formed a family unit. The migration agent has argued that [Ms B] has never lived with the visa holder. Even that being the case, the Tribunal considers that living together is not the only indicia of a genuine and continuing spousal relationship.
57. On balance the Tribunal is not satisfied that in 2012 the visa holder and [Ms B] were in a spouse-like relationship even though they had a child together. As such, s.101(b) of the Act is not engaged. The Tribunal finds, however, that s.101(a) is a live issue and that there was non-compliance with s.101(a) by the visa holder in the way described in the s.107 notice because he had not declared his child, [Child 3], born in [Year 3] to [Ms B].

Should the visa be cancelled?

58. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
59. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- the correct information
- the content of the genuine document (if any)
- whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document
- the circumstances in which the non-compliance occurred
- the present circumstances of the visa holder
- the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act
- any other instances of non-compliance by the visa holder known to the Minister
- the time that has elapsed since the non-compliance
- any breaches of the law since the non-compliance and the seriousness of those breaches
- any contribution made by the holder to the community.

60. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

61. *The correct information*

62. On 20 March 2012 the visa holder lodged an application for a Prospective Marriage (subclass 300) visa with Australian citizen, [Ms A], listed as the sponsor. Within this application he failed to provide a response when asked if he had any children, instead indicating that he did not.
63. The correct information is that the visa holder had a child with [Ms B] who was born in [Year 3], prior to entering a relationship with [Ms A]. The visa holder also failed to notify the Department when his second child with [Ms B] was born in [Year 4], and the Tribunal is satisfied that this was a deliberate act to detract from his relationship with [Ms B] and to ensure his Australian permanent residence would not be impeded by the birth of this second child with her.
64. The Tribunal places considerable weight on the visa holder's lack of transparency with the Department in relation to his personal circumstances.

The content of the genuine document (if any)

N/A

65.

66.

Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document

67. Incorrect information regarding the visa holder's family composition were included in his Prospective Marriage (subclass 300) visa application in that he did not declare a child from a previous encounter. He subsequently, omitted to declare that he had had a second child with [Ms B] in [Year 4], in being granted his subclass 801 Partner visa on 16 June 2015.
68. It could not be said that the fact the visa holder did not declare a child born in [Year 3] with [Ms B], enabled the grant of the subclass 300 visa on the basis of his relationship with [Ms A] in 2012. It is not unusual to have had a child with another partner, or indeed in the context of a casual sexual encounter, prior to entering into a committed relationship. In other words, the Tribunal is not satisfied that had the visa holder declared the existence of [Child 3] he would not have been granted a subclass 300 visa.
69. The Tribunal considers, however, that by the time of the lodgement of his subclass 801 visa in February 2014, the visa holder had motive to be untruthful in his application about the existence of two children with [Ms B], because it could highlight that he had not been in an exclusive relationship with [Ms A] and his chances of being granted permanent residency would have been significantly diminished.
70. Given the visa holder had two children with [Ms A] and he met the criteria for the visa grant via the child exceptions, it is difficult for the Tribunal to definitively say that had the Department become aware of his children with [Ms B] in February 2014, he would not have been granted a subclass 801. The Department would have had to determine that his relationship with [Ms A] had *never* been genuine and continuing for it to disregard the fact he had meaningful engagement with his two biological Australian citizen children. From the Tribunal's view point, it is difficult to say that his relationship with [Ms A] had never been genuine.
71. Having weighed all the evidence the Tribunal considers that but for the incorrect information the visa holder may not have been granted a subclass 801 visa, given the extent of the incorrect answers given and the possible motivation in concealing his relationship with [Ms B] and their children from the Department when he was granted his Combined Partner visa 820/801 on 16 June 2015. The Tribunal places adverse weight on the visa holder's conduct in being granted a permanent subclass 801 visa when under the Regulations, had the Department known about his children with [Ms B] in [Country 3], they had a responsibility to question the bona fides of his relationship with [Ms A].

The circumstances in which the non-compliance occurred

72. It is claimed that the non-compliance occurred when the visa holder was in an abusive relationship with [Ms A] and she did not want him to recognise his children. As stated above, the Tribunal has little credible evidence before it that the visa holder had actually been coerced by his former spouse to withhold information about his personal circumstances from the Department. The Tribunal considers that the visa holder deliberately withheld the fact he had a child with [Ms B] initially, and then that he had a second child with her when he entered into a relationship with her, to serve his sole purpose in achieving a migration outcome.
73. The visa holder states that his actions are mitigated because he wrote to the Department later on to advise that he had not declared his children and that this divulgence should mitigate against his conduct in providing incorrect answers. The Tribunal does not accept this explanation. The letters written to the Department disclosing his true circumstances were self-serving in that he intended at that stage to bring his second family to Australia.

74. The Tribunal can see on the evidence, no unforeseen or extenuating circumstances which would have prevented the visa holder from declaring his children and his relationship with [Ms B] by the time his subclass 801 visa was granted to him in 2015. Rather, the circumstance of his non-disclosure denotes the extent the visa holder was prepared to go to ensure he gained permanent residency in Australia, and to achieve it for [Ms B] and their children. The Tribunal also places adverse weight on this matter.

The present circumstances of the visa holder

75. The visa holder is residing onshore in Victoria and is raising his two children aged [Age 1] and [Age 2] conceived with [Ms B] on his own.
76. From the information it appears that [Child 3] is a national of [Country 1] and [Child 4], the second child, is [a Country 5] national, although their mother is in the process of obtaining [Country 3] citizenship. Were the cancellation to be effected it would mean that as things stand, [Child 3] would return to [Country 1] with the visa holder, and [Child 4] to [Country 5] and their mother, [Ms A] would remain in [Country 3]. This would involve splitting the family unit and the children having uncertain futures in countries where access to education and health services would be diminished.
77. In terms of the possible status of both the visa holder and his children in [Country 3], the Tribunal's research shows that if a person has had refugee status and a residence permit for the past 3 years, then he/she is eligible to apply for [Country 3] citizenship.¹ This does not appear to be the circumstances of the visa holder, however, as he has submitted evidence of a residency permit valid until 2014. Given he has been living in Australia for a significant period it is unlikely that he would have been granted any further residency permits in [Country 3].
78. If a person is married to a [Country 3] national he/she may apply for [Country 3] citizenship after 3 years of legally living in [Country 3].² In the long-term it appears that the visa holder could potentially become a [Country 3] citizen and have the right to live in other EU countries, thereby keeping the family unit intact.
79. In terms of children born in [Country 3] this does not automatically give them the right to [Country 3] citizenship if they are born to foreign parents. Children born in [Country 3] can, however, apply for citizenship after they complete the first grade of primary school, and if both their parents have lived legally and continuously in [Country 3] for at least 5 years before the child's birth.³
80. The Tribunal has taken into account that potentially, were the visa holder and his two children with [Ms B] to return to [Country 3], they could continue to live in that country, accepting that there would be economic and social hardships to be experienced by the children who have benefitted from the Australian way of life. A recent article by Amnesty International on the circumstances in [Country 3] as regards healthcare states:

81. Austerity measures adopted over the past decade continued to severely impact access to health care. Amnesty International's research noted that the austerity measures have continued to impact the accessibility and affordability of health care in [Country 3] a decade after the crisis began and austerity measures were introduced. People interviewed spoke about the multiple barriers they faced accessing health care, including lengthy waiting times and the high costs of care. The economic crisis severely affected people in [Country 3], with huge increases in unemployment and poverty. Even though [Country 3] exited from the

¹ [Reference deleted]

² Ibid.

³ Ibid.

bail-out agreements in 2018, the impacts of the crisis have been on-going. As per available date even today, many of these levels remain worse than before the crisis began.⁴

82. Nonetheless, it could be argued that, all things being equal, it would be in the best interests of the children to be reunited with their mother in [Country 3], together with their father, where they would ultimately have access to other EU countries.
83. In terms of the effects of a cancellation on these two non-citizen children, the Tribunal has taken into account medical expert advice. The visa holder has submitted detailed psychological reports for [Child 3] and [Child 4] by [Dr D].
84. In his report dated [March] 2020, [Dr D] states that the visa holder had concerns that both [Child 3] and [Child 4] were displaying symptoms of stress and anxiety. They both also experienced low mood and cried on their own. In respect of [Child 3], [Dr D] wrote, "...[Child 3] has lived in Australia for two years, she has settled in life in this country, participating in the community through school and sport". [Dr D] applied the Pediatric Symptom Checklist (PSC) to [Child 3] to identify certain psychological characteristics. The measure is a psychosocial screen designed to facilitate the recognition of cognitive, emotional, and behavioural problems so that appropriate interventions can be initiated. He wrote in his report that [Child 3]'s score on the PSC of 28, indicated levels at the cut-off point indicating "psychological impairment". Other measures were applied in relation to depression and anxiety which were not just a response to uncertainty about her future and that of her father, but also separation from her mother.
85. In relation to [Child 4], the visa holder discussed with [Dr D] that since telling her about the appeal process regarding the cancellation of her visa, he has noticed a deterioration in her mental health. [Dr D] accordingly applied further tests which yielded high scores for depression, anxiety and panic.
86. The Tribunal places significant weight in the visa holder's favour in terms of the difficulties his children are having, through no fault of their own, and has turned its mind to whether another shift in their circumstances to another country would cause a further deterioration in their condition and finds that returning to [Country 1], [Country 5] or [Country 3] would represent significant challenges to them.
87. The Tribunal has also had, in the context of the children's mental health, regard to the letter of support from the Principal at [a] Primary School, dated [October] 2019, which states that the children are excellent students and are well regarded by their peers and teachers alike. Several awards granted to the visa holder's children, [Child 3] and [Child 4], have also been submitted, including a Certificate of Achievement for [Child 3] for having met the 2019 Victorian Premiers' Reading Challenge.
88. The Tribunal accepts that considerable disruption and hardship would be caused to [Child 3] and [Child 4] were their father's visa to be cancelled and their visas cancelled consequentially.
89. The migration agents argued strongly that the Tribunal is required to also place significant weight on the fact that the visa holder has two Australian citizen children with [Ms A] in Australia, and while [Ms A] has impeded his access to these children, he is attempting to gain access through the Family Court. To support his case that the visa holder is attempting to gain access to his two other [children], he has submitted a Certificate by a family dispute resolution practitioner dated [February] 2019, certifying that the family dispute resolution process was not a suitable avenue for resolution and a letter from Family Relationships

⁴ Amnesty International, [Country 3] 2019 Annual Report, [Reference deleted].

Centre to the visa holder, enclosing a s.601(8) Family Law Certificate to commence proceedings at the Federal Family Law Court, dated [March] 2019.

90. The visa holder argues that if he is not in Australia he cannot have meaningful contact with his two [children] with [Ms A], and conversely, his [children] could not build a meaningful relationship with him. The Tribunal has evidence before it that the visa holder is paying some Child Support to [Ms A] for his [children's] welfare.
91. Despite the Tribunal's concerns with the visa holder's credibility, the Tribunal does accept that he has a genuine desire for his four [children] to know one another and to be able to have a familial relationship when he is able to gain some access to his [children] with [Ms A]. The cancellation of the visa would mean that his children with [Ms A] who are Australian citizens, would be deprived of a sibling relationship with their two half-sisters.
92. The Tribunal considers that neither the Australian citizen children, nor those the visa holder has had with [Ms B] are in the circumstances in which they find themselves through any actions of their own. Significant and overriding weight should be placed in favour of not cancelling the visa in the circumstances.

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

93. As stated above, the visa holder claims he rectified the incorrect information by writing to the Department in September 2015 to state that he had provided incorrect information in his applications. The Tribunal notes that these letters were posted in conjunction with his daughters' Child (subclass 101) visa applications. The timing of his declarations lead the Tribunal to find that these were made in the interests of achieving a migration outcome for his children with [Ms B]. The Tribunal places limited weight on the visa holder's actions in finally advising the Department of his true circumstances when it suited him.

94. Any other instances of non-compliance by the visa holder known to the Minister

95. In addition to providing incorrect information regarding the fact the visa holder had a child ([Child 3]) in his Prospective Marriage (subclass 300) visa application, he also failed to declare both daughters, [Child 3] and [Child 4] born to [Ms B], when lodging his Combined Partner (subclass 820/801) visa on 11 February 2014. The Tribunal places some weight against the visa holder's continued provision of incorrect information to the Department.

The time that has elapsed since the non-compliance

96. The visa holder lodged his Prospective Marriage (subclass 300) visa application on 20 March 2012. At the time of cancelling the visa in 2018 the Department wrote, "*I acknowledge that the non-compliance occurred six and a half years ago, and that a substantial period of time has lapsed since then*" but then went on to find that this matter did not outweigh the visa holder gaining access to reside in Australia due to providing incorrect information to facilitate the grant of his Prospective Marriage and Partner visas.
97. As the Tribunal has argued, it is has doubts that had the visa holder declared his one child to the Department when he lodged his Prospective Marriage (subclass 300) visa, he necessarily would have been denied entry into Australia, even if his subclass 801 visa would certainly have been in doubt.
98. The visa holder's migration agents have argued that it was irresponsible of the Department to grant [Child 3] and [Child 4] Child visas (101) knowing that the visa holder had provided incorrect information, as the grant led to the stressful circumstances in which the children

now find themselves. They, in effect, argue that had the visa holder's omissions been a significant issue warranting cancellation of his subclass 801 visa, they should have done so in 2015 on lodgement of the Child visa applications, and should not have permitted entry of the children. The Tribunal places minimal weight on this argument in the visa holder's favour, as it appears that at that stage [Ms B] was non-committal about her intentions to migrate to Australia and the reasons for the visa holder's omissions would not have been completely clear to the Department.

Any breaches of the law since the non-compliance and the seriousness of those breaches

99. The Tribunal is not aware of any breaches of the law since the non-compliance. Updated Police Checks will determine whether there have been, although the Tribunal notes the positive character references provided to the visa holder by others.

100. Any contribution made by the holder to the community

101. The visa holder contends that he is actively involved in the Australian community coaching junior soccer clubs, both boys and girls, and that if he were not of good character he would not be permitted to do so.

102. The Tribunal places some weight on the visa holder's contribution to the community.

103. The Tribunal has also had regard to the following matters:

104. Whether there are persons in Australia whose visas would, or may, be cancelled consequentially.

105. The migration agents have argued that [Child 3] and [Child 4] who were granted Child (subclass 101) visas are not dependents on the visa holder's subclass 801 visa, but rather, hold stand alone visas which are dependent on the existence of an eligible sponsor. The cancellation of the visa holder's visa would be the cause of the cancellation of the children's visas. Realistically, however, even if the children's visas were not consequentially cancelled, it is highly unlikely that they could remain in Australia without a guardian.

106. Whether Australia has obligations under relevant international agreements which may be breached as a result of the cancellation

107. In making this decision the Tribunal has placed primacy on the best interests of two Australian citizen children and their two non-citizen half-siblings.

108. The Tribunal has turned its mind to Australia's obligations under the Convention on the Rights of the Child (CROC) as well as the International Covenant on Civil and Political Rights (ICCPR) to place primary consideration on the best interests of the children and the protection of family units.

109. The Tribunal concurs with the migration agents' submissions that the two Australian citizen children would be deprived of having the capacity in the future to build a relationship with their father, particularly if he is subject to a re-entry bar. The children would be deprived of knowing their father and having the benefit of forming a relationship with him.

110. The two Australian citizen children would also be deprived of having contact with their half-siblings.

111. Further, the non-Australian citizen children have recently begun to excel at their studies and to consider Australia their home. Further disruption to their lives could aggravate their already fragile mental health.

112. CONCLUSION

113. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should not be cancelled.

DECISION

114. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Rosa Gagliardi
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:

- (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.